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NATIONAL ABORTION FEDERATION (NAF)

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

NATIONAL ABORTION FEDERATION (NAF),

Plaintiff,

v.

THE CENTER FOR MEDICAL PROGRESS,  
BIOMAX PROCUREMENT SERVICES LLC,  
DAVID DALEIDEN (aka "ROBERT SARKIS"),  
and TROY NEWMAN,

Defendants.

Case No. 3:15-cv-3522-WHO

**NATIONAL ABORTION  
FEDERATION (NAF)'S AMENDED  
ADMINISTRATIVE MOTION TO  
FILE CERTAIN DOCUMENTS  
UNDER SEAL (REPLACING DKT.  
NO. 58)**

Date Action Filed: July 31, 2015  
Trial Date:

Pursuant to Civil L.R. 7-11 and 79-5 and in accordance with the Court's Order re Motion to Clarify TRO and Motion to Seal (Dkt. No. 64), Plaintiff National Abortion Federation ("NAF") respectfully submits this Amended Administrative Motion To File Certain Documents Under Seal (Replacing Dkt. No. 58), requesting leave of Court to file under seal NAF's Motion for an Order to Show Cause Why Defendants The Center For Medical Progress and David Daleiden (aka "Robert Sarkis") Should Not Be Held in Contempt ("Motion") (Dkt. No 58-3), Exhibit 1 to NAF's Motion for Order to Show Cause (Dkt. No. 58-6), Defendants' Motion to Clarify Temporary Restraining Order and documents submitted in support (Dkt. Nos. 57, 57-3, and 57-4), as well as Exhibits 5 and 18 to the Declaration of Derek F. Foran in Support of NAF's Motion for Temporary Restraining Order and Preliminary Injunction ("Foran Declaration"). (Dkt. Nos. 3-7 and 3-20.)

### **REQUIRED CERTIFICATIONS**

Pursuant to the Court's Standing Order of Administrative Motions to File Under Seal, NAF makes the following statements:

NAF certifies that it has reviewed and complied with the Court's Standing Order of Administrative Motions to File Under Seal.

NAF certifies that it has reviewed and complied with Civil Local Rule 79-5.

NAF identifies the documents to be sealed as follows:

- Docket No. 58-3 (NAF's Motion for an Order to Show Cause Why Defendants The Center For Medical Progress and David Daleiden (aka "Robert Sarkis") Should Not Be Held in Contempt);
- Docket No. 58-6 (Exhibit 1 to NAF's Motion for Order to Show Cause);
- Docket No. 57 (Defendants' Motion to Clarify Temporary Restraining Order);
- Docket No. 57-3 (August 7, 2015 Letter Between Derek Foran and Brian Chavez-Ochoa);
- Docket No. 57-4 (August 10, 2015 Letter Between Catherine Short and Derek Foran);
- Docket No. 3-7 (Exhibit 5 to the Declaration of Derek F. Foran in Support of

- 1 NAF's Motion for Temporary Restraining Order and Preliminary Injunction); and
- 2 • Docket No. 3-20 (Exhibit 18 to the Declaration of Derek F. Foran in Support of
- 3 NAF's Motion for Temporary Restraining Order and Preliminary Injunction).

4 NAF identifies that it is the entity that will designate the materials to be sealed as

5 confidential. NAF identifies that the above documents should be filed under seal because they

6 are comprised of confidential material that is subject to the Court's Order granting NAF's motion

7 for a temporary restraining order. NAF certifies that it has provided all other material required by

8 the Local Rule, including courtesy copies in the correct format.

### 9 ARGUMENT

10 The Ninth Circuit has held that the presumption of access to judicial records does not

11 apply where the documents at issue are being filed in connection with a non-dispositive motion.

12 *See In re Midland Nat'l Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th Cir.

13 2012) (recognizing an exception to the presumption of access to judicial records in the context of

14 non-dispositive motions, and stating that, "[u]nder the exception, the usual presumption of the

15 public's right of access is rebutted" (citation and internal quotation marks omitted)). In such

16 circumstances, the appropriate legal standard is "good cause" and the court may issue "any order

17 which justice requires to protect a party or person from annoyance, embarrassment, oppression, or

18 undue burden or expense." *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th

19 Cir. 2006) (citing Fed. R. Civ. P. 26(c)).

20 Here, there is no question that NAF's Motion for an Order to Show Cause ("Motion") is

21 not a dispositive motion, and that the "good cause" standard therefore applies. As described

22 below, this standard is easily met because of the interest in protecting individuals from

23 harassment and threats to their safety.

#### 24 **I. THE COURT ALREADY DETERMINED THAT THE INFORMATION AT ISSUE**

#### 25 **WARRANTS PROTECTION WHEN IT ISSUED THE TRO.**

26 NAF seeks to file its Motion and accompanying exhibits under seal, as well as the exhibits

27 in support of the Foran Declaration. Portions of those papers describe and reveal highly

28 confidential information that is subject to the parties' confidentiality agreements and the Court's

1 Temporary Restraining Order (“TRO”). *See, e.g., Phillips ex rel. Estates of Byrd v. Gen. Motors*  
 2 *Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002) (recognizing that, where a court has previously  
 3 prevented public access to certain materials, this weighs in favor of a finding that good cause  
 4 exists to grant a sealing motion). Other portions identify websites and articles relating to NAF  
 5 members that, if not sealed, would reveal the identities of NAF members subject to the TRO.  
 6 (*See also* Dkt. 67 at 2.) Filing these documents in the public record would defeat the purpose of  
 7 the Court’s TRO, which enjoins Defendants from “publishing or otherwise disclosing to any third  
 8 party any video, audio, photographic, or other recordings taken, or any confidential information  
 9 learned, at any NAF annual meetings,” (Dkt. No. 27 at 1:20-21) as well as from “publishing or  
 10 otherwise disclosing to any third party the names or addresses of any NAF members learned at  
 11 any NAF annual meetings.” (*Id.* at 1:24-25.)

12 **II. SEALING IS NECESSARY TO PREVENT HARASSMENT, INTIMIDATION,**  
 13 **VIOLENCE, AND INVASION OF PRIVACY TOWARDS INDIVIDUALS**  
 14 **IDENTIFIED IN NAF’S MOTION.**

15 As discussed in the Declaration of Vicki Saporta in support of National Abortion  
 16 Federation (NAF)’s Motion for a Temporary Restraining Order and Preliminary Injunction (Dkt.  
 17 No. 3), the information that Defendants are publicizing—including the information learned from  
 18 NAF’s annual meetings that is the subject of this Motion to Seal—constitute a threat to the safety  
 19 and security of the attendees of NAF’s meetings. (Dkt. No. 3-34 (“Saporta Decl.”) ¶ 19.) Many  
 20 of NAF’s members have been targeted by anti-abortion extremists. (*Id.* ¶ 15.) They have been  
 21 stalked, threatened, and intimidated, including being picketed at their homes, churches, and their  
 22 children’s schools. (*Id.*) Some members have had death threats made against them, and bomb  
 23 threats made against their clinics. (*Id.*) Others are forced to wear bullet-proof vests to work.  
 24 (*Id.*) Attendees have had their names put on threatening “wanted” posters and websites featuring  
 25 their photos and personal information that are intended to incite violence against them. (*Id.*)  
 26 Websites (such as <http://www.christiangallery.com/atrocities/aborts.html>) continue to tout attacks  
 27 on abortion providers, complete with graphical depictions of dripping blood, lists of attacks on  
 28 providers (“Aborted and Nearly Aborted Abortionists”), lists of future targets (“Blood Flunkys”),  
 and calls for more targets (“SEND US MORE NAMES!”). (Decl. of Christopher L. Robinson in

1 Supp. of NAF's Amended Admin. Mot. to File Under Seal ¶ 6.)<sup>1</sup>

2 Because of this extreme violence perpetrated against NAF and its members, NAF goes to  
3 great lengths to protect the discussions that take place at its meetings. This violence has forced  
4 NAF to adopt broad security and privacy measures at its annual meetings in order to protect the  
5 content of NAF meetings. These measures include, among other things, providing extensive  
6 security at meetings as well as requiring that attendees sign nondisclosure agreements, which  
7 forbid them from taking photographs, making recordings, or sharing information learned at NAF  
8 meetings with third parties. (Saporta Decl. ¶¶ 6-13.)

9 Notably, individuals who are mentioned in the videos and transcripts that Defendants have  
10 posted—like the individuals whose identities and conversations are at issue in this Motion to  
11 Seal—have become targets of anti-abortion extremist violence. Anonymous internet posts have  
12 leveled death threats against the CEO of a lawful tissue procurement organization, StemExpress,  
13 who was named in the Nucatola video. These threats called the person in question “a death-  
14 profiteer” who “should be hung by the neck using piano wire and propped up on the lawn in front  
15 of the building with a note attached . . .” (*Id.* ¶ 19.) The person posting went on to identify  
16 where the CEO lives and stated: “I’m going there . . . I’ll pay ten grand to whomever beats me to  
17 [CEO] . . . [CEO] must die to save the innocents.” (*Id.*)

18 In addition, there is evidence that anti-abortion activists are closely watching the filings in  
19 this case. Since this suit was filed, numerous references to this case have appeared online,  
20 including within blogs, Twitter, and message boards. As one example, a blog post titled “NAF’s  
21 Suit Against The Center For Medical Progress Is A Goldmine” calls for readers to “crowd-source  
22 our fellow-traveler’s case” and “flood social media with mockery of NAF’s self-damning  
23 assertions.” (Robinson Decl. ¶ 4.) It identifies named counsel for NAF and states “This is your  
24 Adversary. Will you rise to the occasion?” (*Id.*) Facebook posts about this case—and this

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26 <sup>1</sup> At least one court has found that this website, standing alone, would justify refusing to  
27 grant relief to counsel for Daleiden/CMP/Biomax, in a Public Records Act suit that sought the  
28 names of physicians, clinicians and stakeholders who participated in a health workplace pilot  
project at UCSF. *Life Legal Defense Foundation v. Univ. of Cal. Bd. of Regents*, RG12-625716  
(May 17, 2012) (attached as Ex. 1 to Robinson Decl.)

1 Court— are also disturbing. (*Id.* ¶ 5.)

2 As explained in more detail in the accompanying Declaration of Christopher L. Robinson  
3 in support of this motion, NAF’s sealing request is “narrowly tailored to seek sealing only of  
4 sealable material,” as Local Rule 79-5(b) requires. There is no need to disclose to the public the  
5 granular details of the issues specific to NAF’s and Defendants’ motions or the exhibits in  
6 support. Indeed, the purpose of NAF’s Motion for an Order to Show Cause and accompanying  
7 exhibits is to address Defendants’ continuing publication of materials in a manner that runs afoul  
8 of the Court’s Temporary Restraining Order. NAF’s request to file these documents under seal  
9 serves to protect NAF and its members from additional harm, without hindering the public’s  
10 understanding of the issues in this case.

11 Because public disclosure of the information contained in the above referenced documents  
12 would cause NAF and its members continuing substantial harm, the “good cause” standard is  
13 readily satisfied. Accordingly, NAF respectfully requests that the Court grant its motion to seal.

14 Dated: August 18, 2015

CHRISTOPHER L. ROBINSON  
MORRISON & FOERSTER LLP

15 By: /s/ Christopher L. Robinson  
16 Christopher L. Robinson

17 Attorneys for Plaintiff  
18 NATIONAL ABORTION FEDERATION  
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